IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL A. WATSON, :

Petitioner :

v. : No. 06-571

UNITED STATES :

- x

Washington, D.C.

Tuesday, October 9, 2007

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10: 05 a.m.

APPEARANCES:

KARL J. KOCH, ESQ., Baton Rouge, La.; on behalf of the Petitioner.

DEANNE E. MAYNARD, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 06-571, Watson v. United States.

Mr. Koch.

ORAL ARGUMENT OF KARL J. KOCH

ON BEHALF OF THE PETITIONER

MR. KOCH: Mr. Chief Justice, and may it please the Court:

Mr. Watson's receipt of a firearm in exchange for drugs does not constitute the use of that firearm as the word "use" is employed by 18 U.S.C. Section 924(c)(1) for two principal reasons. First, applying the plain and ordinary meaning of the word "use," the receipt of a thing is not the use of that thing. There is no grammatically proper way to say that someone uses a firearm when all that person does is receive it.

Second, treating receipt as use under the statute conflicts with this Court's decision in Bailey v. United States, which held that use requires active employment. And I'll address those two points in turn.

JUSTICE GINSBURG: Would you address first whether receipt of the gun constitutes possession of the

gun?

MR. KOCH: Yes, ma'am. I believe receipt does constitute possession. However, of course, possession standing alone under this Court's decision in Bailey does not constitute use.

JUSTICE GINSBURG: But under the statute as amended, possession is also indictable.

MR. KOCH: Possession in furtherance of the offense is -- is -- would be indictable. That -- that was not charged in this particular case. And I would suggest that the -- that the circumstances of this case might not call that into -- into play simply because his possession really was -- was incidental, and it was following the conclusion of the drug transaction.

So I think -- I question whether the possession in furtherance would necessarily apply here. Of course, it was not charged.

CHIEF JUSTICE ROBERTS: Well, I'm not sure. I have the same question as Justice Ginsburg. It seems to me, absent some precedents which narrows this definition, that that would have been the way to charge your client. That's not what was charged; that's not the indictment; that's not what you're arguing. So I guess the question is more appropriate for the government.

But, if, following Justice Ginsburg's question, this covers it, and it seems to me that it does, then we're not arguing about very much.

MR. KOCH: I understand, Your Honor. My only point, again, would be, that recognizing that "in furtherance," at least by the authors of that language, would suggest it to mean something more than "in relation to,." I think the question could legitimately be asked in a -- in a transaction like this, where the possession basically is what he was attempting to achieve and did, in fact, achieve, but after the -- at the end transaction.

I don't -- I can't answer whether or not, ultimately, that would be -- deemed to be in furtherance or not.

CHIEF JUSTICE ROBERTS: Mr. Koch, let's say that the parties to the transaction are concerned about avoiding exposure under the money-laundering statute, and so they got together and said: All right, we are going to have this deal. What can we use besides money? And they say: Well, let's use guns, or let's use a gun. And the seller of the drugs says: Okay. I'm willing to use that.

Isn't he using the gun in furtherance of the transaction?

MR. KOCH: I don't believe that the -- that, given what the -- what this Court has said in Bailey, that that would constitute active employment still. The --

CHIEF JUSTICE ROBERTS: It's being actively employed as the consideration in the sale.

MR. KOCH: However, the -- from the standpoint --

CHIEF JUSTICE ROBERTS: It's not being shot, but it's still being employed.

MR. KOCH: Yes, sir. From the standpoint of the -- of the seller -- from the standpoint of the drug seller, who's ultimately still doing nothing more with respect to the gun, I think the focus has to be on what are his activities? He hasn't even come into possession of it in the example that Your Honor has given.

CHIEF JUSTICE ROBERTS: But I think it would be a natural, grammatical construction to say he's willing to use the gun for the consideration.

MR. KOCH: Your Honor, I'm not certain that we would -- that we -- that it could be held in the absence even there of even possession -- whether or not that would be enough to constitute the use. That would be the first question that would occur to me. The -- certainly grammatically, and dealing, of course, with

the facts of this case, grammatically the question on the table is: When interpreting 18 U.S.C. Section 924(c)(1) giving it, as this Court held in Smith, its plain and ordinary meaning, the example that was used by the D.C. Circuit in United States v. Stewart, I thought, was appropriate, where -- the coffee shop example, where you have the -- the individual buying the coffee, and you have the cashier.

The -- the customer doesn't -- the customer comes in and pays with the dollar. The cashier accepts the dollar, but the cafeteria isn't using the dollar by receiving it as payment. It's just receiving it. Likewise, the customer isn't using the coffee through the act of receiving it. He's getting it.

JUSTICE ALITO: Well, if we look at this transaction, a guns-for-drugs transaction, is there -- can you think of any good reason why Congress would want to prescribe a 5-year penalty for the person who hands over the gun, but not any penalty for the person who receives the gun and hands over the drugs?

MR. KOCH: I do think that there are distinctions between the two conducts, sir. First of all, certainly the person that -- that has the gun and is bringing it into that transaction I would suggest, as a practical matter presents a different type of risk.

He's got the gun. He's in control of it. He's going to decide when and if to hand it over and in what condition it would be when he hands it over, or not to hand it over at all. So that the --

JUSTICE ALITO: And so that the -- the risk is Congress was worried that somebody would go to a transaction like this with a gun originally intending to trade it for drugs and then when one person gets there, a person decides to shoot somebody with the gun?

MR. KOCK: I think --

JUSTICE ALITO: And that's why they would penalize one side of this transaction and not the other?

MR. KOCH: Well, assuming of course it would -- in Smith the Court held that that is a use within the term of the statute. I think that the -- looking at -- this does not do violence to this Court's decision in Bailey. There still has to be some active employment. The person on the drug end of the transaction is -- really has nothing to do with the gun, doesn't even possess the gun, which -- before the other party decides to hand it over.

JUSTICE GINSBURG: In Smith, the Court said that the reason that selling the gun in exchange for drugs -- what was dangerous about that was the potential for instantly converting the gun from currency to a

cannon. But here isn't that even all the more of concern because one who receives the gun can instantly turn it around and shoot the drug seller?

MR. KOCH: He could if the gun was handed over in a condition -- first of all, there -- were there bullets or not? That's going to be up to, at the first instance, whether he brings them or not, the gun seller. The gun seller can decide whether to hand it over --

JUSTICE GINSBURG: But it's the same on both sides. It seems to me in both cases there is a risk of using the gun. The one who comes in with the gun can use it; the one who receives the gun can use it.

MR. KOCH: I will -- I will grant Your Honor there's obviously risk presented by the presence of the gun potentially by either party. I would suggest that, as between the two parties, the fellow that shows up with the gun who's going to decide when and if to hand it over and in what condition, cocked, uncocked, loaded or unloaded, et cetera, is in somewhat more control.

All that being said, one still gets back to the central point, which is, regardless of Congress's purpose or desires here, they still chose words that had fairly common meanings, in this case "use." And very -- it's grammatically impossible, I'd suggest, in the straightforward transaction and trade situation to

suggest that the guy that's receiving the gun is using it by receiving it, any more than the cashier is using the dollar that I pay for the cup of coffee with.

JUSTICE ALITO: If the person who hands over the gun is not a government agent or informant, is there any doubt that the person who hands over the drugs can be charged with using the -- the gun under 18 U.S.C. Section 2(b)? He causes -- the person who hands over the gun, to do something that is a crime.

MR. KOCH: I do think that there -- that's an issue that's been raised. I -- I question whether, when the underlying offense itself is the transaction and these are the only two parties, whether or not aiding and abetting liability would be intended to extend that far, any more than it would be, for example, to a drug purchaser being charged with aiding and abetting the distribution of drugs.

Certainly, given the severe penalties involved, I -- I'm a little uncomfortable with that being a usage of that statute or usage of the aiding and abetting statute. I also would point out that the overwhelming majority of these cases do involve police informants, practically all of them.

JUSTICE ALITO: Well, you're relying on the language of 924. If you look at the language of 2(b),

is there any doubt that this situation would fall squarely under it? "Whoever willfully causes an act to be done which if directly performed by him would be an offense against the United States is punishable as a principal."

MR. KOCH: That is what that statute says, sir. There is some jurisprudence, and I'm -- it may be older in nature -- that deals with two parties to a transaction and whether or not aiding and abetting liability can be used, again going back to my drug purchaser situation. And I question whether or not the -- the aiding and abetting statute can be used. It would basically, in the drug context, read out the possession statute. Every drug buyer could be charged with distribution as a principal under Section 2. The -- again, of course that's not charged here, and I've not -- I've not seen cases where that has been charged.

CHIEF JUSTICE ROBERTS: Subsection (b) is not charged in the indictment?

MR. KOCH: 18 U.S.C. Section 2 was what I understood the question to be, Judge. I apologize.

CHIEF JUSTICE ROBERTS: No. But that was not charged in the indictment?

MR. KOCH: No, sir.

CHIEF JUSTICE ROBERTS: Section 2(b)?

MR. KOCH: It was not.

Now, the -- the government's brief concedes it would not be natural to say that the customer in my example with the coffee used the coffee. Unless we're prepared to discard that standard usage of words and sacrifice it for the purpose that we believe Congress intended, then I think that the analysis really does stop there if one's reading the language of the statute and applying it.

JUSTICE GINSBURG: Mr. Koch, but the government answers that, a dollar for coffee, by saying it depends what question you ask. So if you ask was the coffee part of a beverage transaction, the answer would be of course yes.

MR. KOCH: One of the problems --

JUSTICE GINSBURG: This is a gun transaction.

MR. KOCH: Yes, ma'am. One of the problems I think that that raises that I see in different contexts with this is the different ways that the word "use" is used in an active or passive context. One might see two people to that transaction and ask, is a dollar being used in that transaction? And I think that we would all fairly say yes. But the focus in 924(c) is on that defendant: Did he use it? Just in the coffee

shop example, did the cashier use the dollar? Or in my example, did Mr. Watson use the firearm? And I think that that's -- that's the question that needs to be asked and when that question is asked in that format, then the answer I suggest is no.

JUSTICE GINSBURG: I don't remember whether you ask in your brief as an alternative argument for the overruling of Smith.

MR. KOCH: I did not raise that in the briefs, no, ma'am.

With regards to Bailey, which I think answers to a great extent some of the questions presented here, Bailey of course held that 924(c)(1) requires evidence sufficient to show an active employment of the firearm by the defendant. Mr. Watson here did not actively employ the firearm. Bailey narrowed the category of uses that fell within the statute. To quote Bailey, it said "It's undeniable the active employment reading of use restricts the scope of 924(c)(1)." That's the jewel of that case. Bailey held that use requires active employment, not only in general but by the defendant.

More importantly perhaps to this case, Bailey held that possession alone is not use, and here Mr. Watson was trying to achieve possession, but -- and

ultimately when he did get possession, he had it instantaneously. So looking at it from a temporal standpoint, first he receives the gun. Before that point he doesn't have possession, so he doesn't even rise to the level of Bailey. After that point, all he did was possess it for an instant, still not enough, I'd suggest, to qualify as active employment or use under Bailey, the most recent definition that we have available.

There's an argument presented by the government that feeds off of Smith's use of 924(d) which I wanted to mention briefly. The -- and that is the -- the importation of the definition of the term "use" from 924(d), the forfeiture provision of the statute, into 924(c).

In Smith, the Court held that there were predicate offenses for 924(d) in which the only way that the weapon could be used was in a non-weapon use, which is what the Court was concerned about in the Smith case, and therefore the Court found, looking at those predicate offenses that had non-weapon uses only, that therefore the term "use" as it's employed in 924(d) must include non-weapon use. That logic, however -- and that's the argument made by the government -- that doesn't translate into the situation we have here. It's

addressed, by the way, on page 9 of our reply brief in some detail. I'll talk about it briefly.

First of all, 924(d) is a forfeiture provision and the focus there necessarily is on the firearm, not on the defendant. The language in 924(d) is, quote, "any firearm or ammunition intended to be used in one of the predicate offenses." That's compared with 924(c), which states "any person who during and in relation to a drug trafficking crime uses or carries a firearm."

So you have firearm intended to be used on the one hand, versus a person who uses a firearm. One might say perhaps that in this transaction a firearm was used, but not -- that's a different thing from saying that Mr. Watson used the firearm. It's a passive versus active formulation.

JUSTICE GINSBURG: It has to be used by somebody, some human, and the human in this case is Mr. Watson.

MR. KOCH: Well, ma'am, I think under Smith the human that's using the firearm in the transaction is actually the person that came with the firearm to use it to purchase drugs. And as -- as Smith said that that was definitely a use, it wasn't even really contested in Smith. And so I -- and I'm not contesting for this case

obviously that that person that showed up with the gun is using the gun to get drugs.

JUSTICE SCALIA: Excuse me. It wasn't contested in Smith?

MR. KOCH: I beg your pardon, Judge. I meant that the Court, in its holding -- I recognize that it was contested. In its holding, the Court said that it tended to focus more on the question of whether or not a nonweapon use would -- would be required. But the -- certainly as between the two parties in this transaction, the guy that shows up with the gun trying to use it to get drugs is certainly making use of it in a way that, that recipient is not.

The -- in, in Smith, the Court reached the opinion it did about the meaning of the term "use" only because there were, there were predicate offenses in which the only uses available were nonweapons uses. By contrast, here the predicate offenses that are suggested to import this definition of "use," there aren't any predicate offenses in which the only way to commit the offense is through receipt.

I'll grant you that there are predicate offenses in which receipt is one of the ways in which the offense can be committed, but it's not the only way. And so that logical step can't be made, as it arguably

could have been in Smith.

And finally, unlike the situation in Smith, here we know that the predicate offenses can't be interpreted --

JUSTICE SCALIA: Excuse me. Go back over that.

MR. KOCH: Yes, sir.

JUSTICE SCALIA: Why couldn't it have been said in Smith that -- that trading it for drugs was not the only way in which the offense could have been committed? Couldn't the same thing have been said in Smith?

MR. KOCH: In Smith the argument, as I took it from the opinion, Justice, was that the -- when one looked at, at the predicates, there were several which had, according to the opinion, only nonweapon uses. So if, if it's used or intended to be used in committing one of those offenses and one looks at those offenses and there's only nonweapon uses, then so the argument goes, that means nonweapon uses are part of use.

JUSTICE SCALIA: So the issue in Smith was weapon versus nonweapon, and that's not what you're arguing here?

MR. KOCH: That's correct, sir.

JUSTICE SCALIA: The issue here is use

versus nonuse, active employment versus passive receipt?

MR. KOCH: Yes, sir.

JUSTICE SOUTER: Why isn't it -- why isn't your argument more directly that the issue here is -- is nonweapon use by A versus nonweapon use by B? You represent B and you say B wasn't the one who used it in a nonweapon sense?

MR. KOCH: I agree that certainly Mr. Watson didn't use it in any weapons sense. So if there is a use at all, it would be in a nonweapon sense.

JUSTICE SOUTER: And if you are right, that's the end of the case.

MR. KOCH: I understand, Your Honor. I understand what you're saying. I believe you're right. That is another way. It's not -- it's not the direction that we went, but that makes sense.

The -- what we focused on was use or not at the first instance. And Smith having decided that in that case use and defining it broadly to include a nonweapon use here, we're getting to the point where there's no use at all in the first place.

JUSTICE SOUTER: But you're not -- as you said before, you're not arguing for the overruling of Smith, and therefore, you concede that the other party to the transaction used the gun.

MR. KOCH: Yes, sir.

JUSTICE SOUTER: In a nonweapon sense.

MR. KOCH: Yes, sir.

JUSTICE SCALIA: I think you are making his argument. I think you're -- you're too humble, the argument you're making.

JUSTICE SOUTER: It's really not a bad one. I mean, you don't --

(Laughter.)

JUSTICE KENNEDY: But -- but what you're saying is that all Watson did was to receive the gun. But he agreed to accept the gun as payment.

MR. KOCH: Yes.

JUSTICE KENNEDY: It seems to me that in that sense he used a gun. It wasn't his gun yet, but he agreed that if the gun would be brought to the scene of the transaction, that he would accept receipt of it.

MR. KOCH: I would suggest, sir, that the agreement couldn't rise to the, to the level of active employment as that term is used in Bailey. In other words, at that point all he has done is make a statement that he'll accept something if it's offered. Whereas in Bailey --

JUSTICE KENNEDY: He says, you get a gun, you put it in your car, you come to my house, you bring

that gun with you, and I will give you drugs. I think in a sense he's using the gun. It's through the, the actions of another that he is doing it to be sure.

MR. KOCH: We -- I would take the position that he certainly, in a situation like that where he is, he is not possessing the gun, he is expressing his intentions or desires with respect to it. But he is not in a position to do anything more than that. I don't think that that fits within the definition of "use." I don't think that if I say that, that I'd like to buy your house and if you'll sell it to me, that I'm using the house.

JUSTICE KENNEDY: Perhaps. But it seems to me to unduly constrict the case to say that all he did was receive it. He did more than that. He agreed in advance.

MR. KOCH: It is correct that when he -- that although he initially wanted to ask how much the gun was --

JUSTICE STEVENS: He agreed to let the other party to the transaction use a gun to pay for the drugs, the other party to make the use of the gun.

MR. KOCH: Factually what happened was that he wanted to buy a gun. And then the police officer, the undercover people said, well, instead of giving

money, we'll take drugs for it, which of course, brought us within the statute. That's the factual, particular factual circumstances here.

JUSTICE BREYER: What do you have besides the linguistic argument? I mean, when I start out, I can't think of a reason why Congress wouldn't want to penalize the buyer, not the seller. We are dealing with a statute that does catch your client, if they had only charged him with the right part. But no one in his right mind would ever rely on a ruling in your favor to actually engage in such a transaction, since it would violate the statute in 15 different ways. I exaggerate, but you see the point.

So you have a linguistic argument which people are -- you're right, I think, in saying it's awkward but not impossible. And, therefore, awkward but not impossible; we create an anomaly in the law. I can't think of a reason why to do it. So what else do you have?

MR. KOCH: Bailey. I have this Court's decision in Bailey, Your Honor, namely there that it can't just be a use. Even if we were to go ahead and hold our mouths and make that awkward formation and say what he did was a use, it's still not rising to the level as Bailey interpreted the term of active

employment.

JUSTICE SCALIA: And, of course, you could say the same thing about Bailey, I suppose. You know, What was there in Bailey except -- what was the term, linguistic -- nothing but a linguistic decision.

MR. KOCH: I guess ultimately --

JUSTICE SCALIA: Bailey doesn't make any more sense either from a policy standpoint.

MR. KOCH: I do think --

JUSTICE SCALIA: We sometimes we rely on linguistics, don't we?

MR. KOCH: Yes, sir.

JUSTICE BREYER: And sometimes we try to --

JUSTICE SCALIA: And sometimes the words of the statute.

MR. KOCH: I do think --

JUSTICE BREYER: I don't want to put you in a whipsaw here.

(Laughter.)

JUSTICE BREYER: Sometimes policy seems relevant, too, to figure out what Congress wanted.

But let me go back to the question I had, which is do you want to us overturn Smith? Are you asking that, because I could understand it more easily if you said, look, both sides of the transaction should

be treated alike, but they should be both outside the word "use."

MR. KOCH: I do not believe it's necessary for this Court to overrule Smith in order to rule for the Petitioner here, because of -- because of the differences, first of all linguistically; and secondly because of the reliance on Bailey.

JUSTICE GINSBURG: And in answer to my question, you said you were not urging the overruling of Smith?

MR. KOCH: That's correct. That being said, I think that there is, there are arguments that can be presented, they were presented in Smith, as to whether one could take one position or the other. But it doesn't, it doesn't do violence to Smith to hold for the Petitioner here.

Ultimately, when you look at the Bailey decision and at the facts of Bailey, and there you have people riding around with guns in the trunk of their car, and that's held not to be a use within the statute.

Well, here Watson didn't even do that. He never had the guns in the first place going into the transaction. So it seems to me if Bailey --

JUSTICE BREYER: But he receives the gun and it could have been loaded. And if it was loaded, you

receive a loaded gun, and you're there and you give the money for the gun and you have the gun and somebody comes up, maybe you'll shoot him. I mean, that seems like a risk.

MR. KOCH: Under Bailey, however, if all he did was receive the gun, hold it in his hand, Bailey says that's not enough, that's not a use. And, of course, those are the facts of this case.

JUSTICE KENNEDY: Suppose he received the gun, loaded it and said, well, now, let's renegotiate this transaction?

(Laughter.)

MR. KOCH: As Bailey -- as Bailey thought very clearly, if he then takes the gun and uses it to communicate a threat to the other party, then he is making a use. He is now actively employing it, in this case, as a threatening item.

JUSTICE KENNEDY: But he doesn't brandish it. He just, he puts it in his pocket and he says: Let's renegotiate this. What result? Could the government charge him?

MR. KOCH: Your Honor, I believe if the jury was to find in that factual scenario that that was -- that he was, in fact, silently making reference to the gun, then I think that gets you within Bailey. There's

all kinds of things Mr. Watson could do beyond what the facts of this case are that would turn it, what he did, into active employment and use. But merely getting it and putting it -- and holding it, which are the facts in this record, doesn't -- doesn't rise to the level of use under Bailey.

JUSTICE BREYER: I thought Bailey involved a guy, he had the gun in a locked thing in the trunk of his car, which is a little different from holding it in your hand.

MR. KOCH: There were -- there were actually two, two different fact patterns in the consolidated. One had a gun that was locked up in another room, the other one had guns in the trunk, with expert testimony being that that was the typical method of drug dealers to protect their drugs and things.

JUSTICE GINSBURG: If he has a gun in his hand he is certainly carrying it.

MR. KOCH: He did have the gun in his hand then he would be carrying it under Muscarello and the other cases. That's correct. Yes, ma'am.

Recognizing again I just would point out that whatever condition Mr. Watson had the gun in and -- in this record that's unloaded -- was the choice, not of Mr. Watson but of the people that brought him the gun.

In this clip fed gun it was up to him whether you give him a clip or not, without which the gun is useless, which in this case was the choice of the police officers as to how they were going to hand it to him.

MR. KOCH: I have no other -- nothing else, unless there's any questions.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Koch. Ms. Maynard.

ORAL ARGUMENT OF DEANNE E. MAYNARD

ON BEHALF OF THE RESPONDENT

MS. MAYNARD: Mr. Chief Justice, and may it please the Court:

Petitioner used the firearm by accepting it in exchange for his drugs. In doing so Petitioner used it during and in relation to a drug trafficking crime. Although the situation in Smith was different, the principle of Smith is that use of a firearm as an item of trade or commerce -- specifically used as the medium of exchange -- is a use falling within the meaning of Section 924(C).

JUSTICE SOUTER: But that does not answer the question use by whom. As I understand it, we are not really arguing about whether the gun was used in the transaction; we are arguing about whether the defendant was the one who used it.

MS. MAYNARD: And the Petitioner did use it here, Your Honor. In agreeing to take it in exchange for a certain amount of his drugs --

JUSTICE SOUTER: Yes, but I mean, the problem you, it seems to me you've got that you can't totally paper over is that that's not usually the way we talk. I mean, if I buy a car, and pay money for it, I do not use the car in the transaction. It's what I have after the transaction is complete; and you, you got that kind of linguistic problem here, it seems to me.

MS. MAYNARD: If you buy the car, then you have used the car as an item of trade or commerce during or in relation to that commercial transaction. We don't usually talk that way but we do -- and one can --

JUSTICE SCALIA: It's enough to say we don't usually talk that way.

MS. MAYNARD: I don't think so, Your Honor. As long as --

JUSTICE SCALIA: That's the end of it. We don't talk that way. We don't say use a car when you buy a car.

MS. MAYNARD: Well here, Your Honor, it's important to put it into statutory context, of course, and the statutory context asks whether or not one has used the firearm during or in relation to a drug

trafficking crime, here a drug transaction. And I do --

JUSTICE SOUTER: It adds an additional element you have to prove but it doesn't answer the linguistic point.

MS. MAYNARD: I think one can employ use in a natural way to mean receipt in the way that Petitioner used the firearm here. The subway system uses tokens.

JUSTICE STEVENS: If you're on the other side of the transaction, it's perfectly natural to say I used the gun for the transaction. What is the converse sentence? I used the gun --

MS. MAYNARD: I used the gun as a medium of exchange to sell my drugs. Just in the same way that --

JUSTICE STEVENS: I didn't use the gun as a medium of exchange. I accepted the gun as a medium of exchange. He didn't use it until he got it.

MS. MAYNARD: I believe in any barter transaction, Your Honor, in particular, where one side has said as they negotiate it out, I will sell you this amount of drugs for this particular firearm, then both have used the gun as the medium of exchange --

CHIEF JUSTICE ROBERTS: So if you have -- sorry.

JUSTICE STEVENS: But you don't have the simple sentence. I used the gun to pay for the drugs --

that's easy, but you don't have a simple countervailing sentence.

MS. MAYNARD: I --

JUSTICE KENNEDY: I suppose you could say we used the gun in order to complete the drug transaction.

MS. MAYNARD: And -- and the drug dealer used the gun as the medium of exchange to complete his drug sale, and I do think we do sometimes use "use" in that way, Justice Stevens. The subway system uses tokens. The metro system.

CHIEF JUSTICE ROBERTS: Well, let's say -- let's say you have a duel, and each person in the duel needs to have a weapon. One person has a gun; the other person has the sword. Would you say the person with the sword is using the gun in the duel?

MS. MAYNARD: Well in a --

CHIEF JUSTICE ROBERTS: Because you can't have a duel without both people having weapons.

MS. MAYNARD: You would have certainly used --

CHIEF JUSTICE ROBERTS: You wouldn't say that the person --

MS. MAYNARD: -- the sword as weapon. There is no exchange there, Your Honor. Here it's crucial, because you have during your relation to a drug

trafficking crime, which here is the drug exchange, just like in Smith.

CHIEF JUSTICE ROBERTS: Each person in the drug exchange brings to the table what they've got. The one has the drugs; the other brings the gun. That doesn't mean that the person with the drugs is using the gun.

MS. MAYNARD: If he agrees to trade his drugs for the gun as the currency to close the drug transaction, I believe he has used the gun in the way that we normally use the word.

JUSTICE SOUTER: But the only way you can make that argument is to define the crime as consisting of the agreement as opposed to the consummated transaction.

MS. MAYNARD: No. I think the -- I think the crime is the taking of the firearm in exchange for the drugs.

JUSTICE SOUTER: Well, I thought you said a minute ago that he was using it because he agreed to accept it.

MS. MAYNARD: I think one could make the argument, Justice Souter, that an agreement alone is a use once, one agrees to use the gun as the medium of exchange to sell one's drugs. The Government is not

pressing that point here today and we don't, and the Court need not go that far because here Petitioner did receive the drugs, and the reason that possibly the agreement line goes too far is the rationale of this Court's decision in Smith where the Court pointed out that someone who makes a material misstatement in order to acquire a gun is clearly not using the gun, but the Court gave examples of receipt offenses in, in the forfeiture provisions in Section 924(D) where receipt of a firearm is a use under the statute.

JUSTICE SCALIA: Why -- why wouldn't making a material misstatement in order to obtain a gun constitute a use of the gun -- as much as it, the receipt of the gun constitutes a use of the gun here? What's the difference between the two situations?

MS. MAYNARD: I think one could make the argument, Your Honor, as I said, that making material statement. I'm saying the Court in Smith --

JUSTICE SCALIA: Not if you believe Smith.

MS. MAYNARD: I beg your pardon.

JUSTICE SCALIA: Not if you believe Smith.

MS. MAYNARD: Because -- and that's why the Government is drawing the line today at actual receipt, and that's - that's all that's involved in this case. The actual taking of the firearm where then you have all

the dangers present with which Congress was concerned, which is --

JUSTICE STEVENS: Yes but Justice Breyer made the very persuasive argument that it doesn't make sense to treat both sides of the transaction exactly the same; but isn't it the fact that in many drug transactions the buyer is not treated the same way as the seller? It's a crime to sell poison drugs but it may not be a crime to buy the poison drugs.

MS. MAYNARD: Well, there are two points in response to that, Your Honor. One is that if the buyer of drugs buys the distribution quantity, then we do often treat the buyer as a distributor under the distribution statute.

JUSTICE STEVENS: But generally speaking buyers and sellers are not always treated alike in the criminal law, are they?

MS. MAYNARD: When Congress -- no that's correct, Your Honor; but in those cases where Congress uses words, like it does in the distribution statute, that clearly targets one side or other of the transaction. But here what the Court is interpreting is the much broader word, "use," and we know from Section 924(D)'s forfeiture provisions that Congress employed the word use broadly in Section 924(d) and used it to

include receipt crimes; and Smith cites several examples of receipt crimes that Smith believed was a use, including unlicensed receipt of a firearm from out of State, receipt of a stolen firearm and receipt of a firearm with an intent to commit a felony; and in context Congress clearly did use "use" broadly in Section 924(D). If -- if in response to their argument in Ponce, their argument about (D)(1), the forfeiture provisions in (D)(1) and D 3, I do think those provisions strongly support the Government's argument here.

JUSTICE SCALIA: Why? There's -- they refer to crimes in which there has been a receipt but there has also been a conveyance. Why do you focus on the receiver rather than the conveyer?

MS. MAYNARD: Because our reading, Justice Scalia, gives full effect to the provisions that Congress has carefully chosen to place in (D)(3) and the Petitioner's reading does not.

JUSTICE SCALIA: What are they?

MS. MAYNARD: And if I could explain it. In (D)(1) -- it's on page 8a of our brief, (D)(1)-- in 924(D)(1) Congress provided two principal ways in which the Government can forfeit firearms. The first is if an offense is completed, the Government can forfeit a

firearm that is involved in or used in that offense.

JUSTICE SCALIA: Involved in -- that broadens that enormously, doesn't it?

MS. MAYNARD: Yes it does, Your Honor; but that actually strengthens my point.

CHIEF JUSTICE ROBERTS: It cuts the other way. Congress knows how to say involved in if it wants to reach that broadly, and it didn't do it under the provision in which -- pursuant to which Mr. Watson was indicted.

MS. MAYNARD: Well yes, Your Honor, but if you allow me to continue on, further on in (D)(1) Congress used a narrow subset of crimes some of which include receipt crimes where it only used the word use and that's the logic to this Court's decision in Smith and it applies equally here. Further down in (D)(1) Congress allowed the Government to forfeit firearms intended to be used in certain very specific listed crimes, and in other words to forfeit the firearms before the -- the crime actually is committed. Some of those crimes include -- receipt crimes -- include the very receipt crimes listed by this Court in Smith' and so given that Congress believed that the firearms intended to be used in purely receipt crimes were ultimately going to be used by the receipt, Congress

employed the term here very broadly including to receipt of a firearm.

JUSTICE SCALIA: It could be -- it could have -- it is intended to be used, not necessarily. As -- as your opponent pointed out, this section does not focus on the individual. It focuses on the firearm, simply for -- for confiscation of the firearm. And, therefore, it suffices if either side intended it to be used. It doesn't have to be the recipient who intended it to be used even though it's a receipt crime. It was intended to be used by the other side. Wouldn't that make sense?

MS. MAYNARD: I think if you were to interpret (d)(3) in that way, Your Honor, you would do great violence to what Congress intended. If I can point you to page 10-A of our brief in -- it's (d)(3) that sets forth very particularly the crimes that Congress thought the government should be able to forfeit firearms before the crime occurs.

JUSTICE SCALIA: What page is that?

MS. MAYNARD: It's on the government's gray brief, 10-A. In (e) of 922 -- this is 924. I'm sorry, 924(d)(3)(E). It includes any offense described in section -- and it lists several examples including 922(n). And 922(n) is set forth in the government's

brief on page 2-A, which makes it a crime for someone under felony indictment to ship, transport, or receive a firearm.

Now, under Petitioner's reading they would say: Well, that's fine. That still has meaning. Under our reading of "use," the government can forfeit firearms that the person under felony indictment intends to ship or transport, but cannot forfeit firearms that the --

JUSTICE BREYER: This is what -- this is what is bothering me about your side of this case. I start thinking this is a total fluke. Normally, you would charge him under "possession in furtherance of," which you didn't for reasons I don't know. Or he would be an accessory, which he isn't here because the other side was a government agent. So we've got a fluke.

Now, if I accept your linguistic approach, I don't know what I'm getting into. Imagine an artillery team. One loads the ammunition; the other pulls the trigger. We say the team used the ammunition, but the guy who pulled the trigger by himself didn't.

Think of a baseball team. The pitcher doesn't use the bat, but the team does.

Now, if I take your linguistic approach, where am I in respect to other statutes? But if I deny

your linguistic approach on the ground that it's unnatural to say "use" of the -- the individual used it, all I've done is create a fluke case because it will never come up again.

MS. MAYNARD: I don't think that it's -- several responses, Your Honor. I don't think it's unnatural to use "use" to mean "receipt" when you're talking about using something as a medium of exchange during and in relation to a drug trafficking crime. Because, as I said before, company stores use script. American stores use dollars. French stores use euros. We can use the word "use" and then have to wait --

JUSTICE BREYER: But those are all examples that I used the gun to pay for the item. You don't use the word "use" when you're the seller. It doesn't fit.

MS. MAYNARD: No, Your Honor. I disagree. I think when a company store uses script, that means it accepts script as money from the company employees.

CHIEF JUSTICE ROBERTS: So if Congress passes a statute saying anyone who uses a gun in a crime of violence gets an additional sentence, the person who is shot is using the gun in a crime of violence?

MS. MAYNARD: You wouldn't have to go that far here, Your Honor, because the "use" here is use as a medium of exchange. So the court need go no further.

And that's another response to Justice Breyer. The Court need go no further than it did in Smith, which you -- it doesn't have to -- we have much more than receipt simpliciter here, Justice Breyer. We have the negotiated transaction where he received the firearms as the medium of exchange.

CHIEF JUSTICE ROBERTS: So is that a necessary element of the offense: That the transaction be negotiated in advance?

MS. MAYNARD: No, Your Honor, if you take it as the medium of exchange to sell your drugs. He doesn't dispute that he engaged in a drug trafficking crime, and he doesn't dispute that he took the gun as the currency to close that drug deal, and that is a use within the meaning -- within a natural meaning of "use," if it is used as currency.

JUSTICE KENNEDY: Are you saying that the parties are viewed collectively so that in Justice Breyer's example the pitcher and the batter used a ball and a bat. Is that your position? And in this case the seller and the buyer used drugs and a gun.

MS. MAYNARD: In any bartering exchange, Justice Kennedy --

JUSTICE KENNEDY: Well, does that fit with the words of the statute, any person who --

MS. MAYNARD: Any person --

JUSTICE KENNEDY: Even though it's a collective enterprise, you can still focus on one of the parties and prevail. Is that your position?

MS. MAYNARD: Well, imagine -- imagine a statute that made it a crime to use United States currency during and in relation to a drug trafficking crime. A drug dealer who sold his drugs for cash would surely be in violation of that statute.

This is no different. The Court has already held that using the firearm as currency is a violation of the statute.

CHIEF JUSTICE ROBERTS: I don't think -- I don't see how your hypothetical advances the argument. I mean, I don't necessarily agree that someone who sells drugs for currency is using the currency in the transaction. They are accepting it. It is what they want. That's not the same as using it.

MS. MAYNARD: No, Your Honor. I think they are using it as the medium of exchange, which I think even under the sentence rationale in Smith -- such as -- such as statutes, if you would say: Well, what's the normally intended use of United States currency? And that would be as the medium of exchange, and both parties would be --

CHIEF JUSTICE ROBERTS: Well, that's what weakens your hypothetical. It's not the normal use of a gun as a medium of exchange.

MS. MAYNARD: Yes, but the Court has already held that using a gun as the medium of exchange falls within the statute.

JUSTICE GINSBURG: May I ask --

CHIEF JUSTICE ROBERTS: It held that the person who does use the gun, which is the natural, grammatical construction, uses the firearm. That's quite a bit different than the question of whether someone who receives it as the consideration is using the firearm.

MS. MAYNARD: I think the rationale necessary to the holding in Smith, Your Honor, was that use of a gun as an item of trade or commerce, specifically as the medium of exchange, is the "use." And, in fact, Smith refers several times to an earlier D.C. Circuit decision in Harris, a per curiam, a public per curiam, in which two members of this Court were on the panel, that involved this very fact pattern, where the -- the --

JUSTICE STEVENS: Yes, but the argument in Justice O'Connor's opinion was largely linguistic. The natural use of the word "use" is to say: I used it to

pay for the gun -- I used it to pay for the drugs, rather. But you don't have a countervailing sentence that fits into anything in her opinion, and you haven't really answered his reliance on the -- on the other case, which requires active use.

MS. MAYNARD: I think in -- in Bailey, Your Honor, the Court required a use that makes the gun an operative factor, a use that changes the circumstances where both parties are aware the gun is being used.

This is a far cry from Bailey. This is not locked-up weapons where only one party is aware of their existence to protect the store of drugs. This gun was front and center, part and parcel, of the drug transaction. It was --

JUSTICE GINSBURG: It was -- Watson possessed the gun, would you agree with that, in furtherance of the transaction? Would you say that this case fits the statute, as amended, so it could have been charged as possession?

MS. MAYNARD: Yes, Your Honor. That's the government's position.

JUSTICE GINSBURG: Why was it -- why wasn't possession charged here?

MS. MAYNARD: I do not know the specific circumstances of the charging decision here, Justice

Ginsburg, but in the Fifth Circuit the law was already clear that this was a use. And, indeed, when Congress amended the statute post Bailey to expand this Court's understanding of the meaning of "use," there was no need to address this particular fact pattern because most of the circuits had been --

JUSTICE GINSBURG: But the prosecution would certainly want to assure the success of the argument; and if this is clearly possession, why wasn't possession charged? And does the Department of Justice give any guidance to prosecutors since the 1988 amendment on what to charge in these situations?

MS. MAYNARD: I don't know the answer to that, Your Honor. I don't know the answer to either of those questions, but I do know that we argued in our opposition to the cert petition that this question doesn't have much going-forward significance because of that new amendment.

JUSTICE SCALIA: Maybe they were doubtful about whether the "possession" thing applies here. I don't know. Possesses a firearm in furtherance of the crime -- I mean, the crime has been completed by the time the -- the person who is receiving the gun has possession of it.

MS. MAYNARD: I think it's part and parcel

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JUSTICE SCALIA: It's hard to say it's in furtherance of the crime when the crime is over once he gets it. His possession is not in furtherance of the crime, it seems to me. It's the other person's possession that's in furtherance of the crime. He possesses it so he can turn it over, which is the crime. But I mean I'm just not all that sure that you have a hundred percent easy case on the possession point.

MS. MAYNARD: Well, the Petitioner agreed with you on that, Your Honor, but four circuits have agreed with the government. On the going-forward basis, we think we do have a good argument. Here, and in your hypothetical, imagine the situation where the gun is turned over first, and then the payment -- and then the drugs are traded. It would certainly seem that you possessed it in furtherance there.

I think it is possession in furtherance in -- in -- because it is the sine qua non of drug transactions. It's the very part and parcel of drug transactions. But it does -- this case does matter to the government because the government has prosecuted peeople properly, it thinks, under the "use" prong of the statute. Those people are -- currently stand convicted; and, as experience proves post-Bailey, if

this Court were to rule against the government here, that could have an effect on those people's current incarceration.

If I could get back to my 922(d) point, just to finish up, which is that --

CHIEF JUSTICE ROBERTS: Well, I just -- I don't understand the significance of the argument you just made. Are you saying that because some people might be let out of prison if we correctly construed the statute, we should read it your way?

MS. MAYNARD: No, Your Honor. Of course if the Court feels that these people are properly convicted, then, you know, they can pursue whatever remedies they may have.

CHIEF JUSTICE ROBERTS: So what was your point referring to the people who were convicted under this statute --under this construction of the statute?

MS. MAYNARD: That it -- that it is of ongoing importance to the government, even though as a prospective matter the government may be able to charge this conduct under possession and furtherance.

CHIEF JUSTICE ROBERTS: I thought the argument you made earlier was that this may not be of particular ongoing significance because of the amendment.

MS. MAYNARD: Right, Your Honor. From now on, the government could charge, if you rule against us in this case, we believe we can charge this conduct under possession and furtherance. However, my point is -- is that we nevertheless care about the result in this case. We believe that people in this situation have used a firearm as a medium of exchange during and in relation to a drug trafficking crime and stand properly convicted. It was only to make the point that the government does have an interest in how the Court rules in this case and that it's not meaningless to us which prong applies here.

Back to the 922(d)(4) point, the -- under Petitioner's reading, it would mean that the government can't forfeit firearms in a situation like someone under felony indictment ships or transports -- intends to ship or transform a firearm. Under Petitioner's reading the Government can forfeit that because they consider that to be active verbs, but under -- if the person under felony indictment simply intends to receive a firearm, the government would have to wait until that person receives the firearm in order to be able to forfeit it, and that is -- I suggest that no rational Congress would have meant that by referring to the provision.

They do point to -- well, if there -- if

there are no further questions, the government believes that this crime,this -- that the use of the gun in this manner is a crime, that there's no reason to believe that Congress would have wanted the defendant in Smith to stand convicted of this crime but to leave the drug dealer who ends up with the gun not with the punishment for this crime.

JUSTICE STEVENS: Something just occurred to me. When you distinguish the case,our unanimous opinion requiring active use, you said, well, that -- that gun was in the trunk of a car so -- what if this gun had been in the trunk of the car also and the guy said, well, it's now -- that's your gun?

MS. MAYNARD: Whose trunk is it in, Your Honor?

JUSTICE STEVENS: Well, they just transferred ownership in exchange for drugs with -- by transferring title to a gun that was located in the -- in the trunk of a car.

MS. MAYNARD: If he has constructive possession of it, Justice Stevens, and he's -- I believe he would have received it and that would be sufficient.

JUSTICE STEVENS: So it -- it was not sufficient in -- in Bailey in any case, but it would be sufficient here because it played a role in the

transaction?

MS. MAYNARD: Yes, Your Honor.

JUSTICE STEVENS: Thank you.

MS. MAYNARD: But -- I mean Bailey makes examples to things that would involve an active employment including reference to a gun that -- if the reference to a gun changes the circumstances of the underlying offense.

JUSTICE GINSBURG: But -- but Smith, in Smith, Justice O'Connor used the illustration turning currency into a cannon. You can't do that very well if the gun is in a car, in a locked trunk in a car on the street. You can't turn the currency, the gun, into a cannon.

MS. MAYNARD: That's true, Justice Ginsburg, and if the Court wanted to limit it to "use" means that you've actually taken possession of it because that -- that's all the government is defending here. That's what happened in this case. That's what happens in most of the cases.

I -- I would also like to say in response to their point about the government sting, that if you look at the cases in the courts of appeals, there are many cases where -- that indicate these kinds of trades do happen in the real world absent government involvement.

For example, in the First Circuit's decision in Cotto, which is currently pending before the Court, the -- the person who ultimately came -- became the confidential informant -- before that the drug deal her sold to her drugs for guns on 20 separate occasions. So this does go on --

JUSTICE BREYER: Is -- is there any reason in such a case, if you lost this case, in the future could you not just charge, as Justice Alito said, that they're a principal in the possession by the seller?

MS. MAYNARD: We -- we believe --

JUSTICE BREYER: If the government is not involved? And if the government's involved on the other side, I guess you'd have to charge an attempt.

MS. MAYNARD: There is no attempt offense under Section 924(c), Justice Breyer. You can use a gun during and in relation to an attempted drug crime, but you can't attempt to use a gun.

The -- the government believes it could, on a going-forward basis, charge possession -- oh, you're asking me about whether we could charge aiding and abetting going forward. The -- the Seventh Ccircuit has suggested in Dick that that would be open to the government to charge. I think that -- and potentially, even though it wasn't in the indictment here, it could

be read into the indictment. But there are two possible issues: One that my colleague has pointed out, which is in some cases where Congress has criminalized one side of the transaction but not the other. And so that might be the situation here. The Court --

JUSTICE BREYER: And so your -- your practical argument then is that there has been considerable reliance on your interpretation to the extent that many people have been convicted under it. How many?

MS. MAYNARD: That I don't know, Your Honor.

JUSTICE BREYER: About? About? Have any rough idea?

MS. MAYNARD: I don't know, Your Honor, but there are six circuits on our side of the conflict and -- so it -- it -- I don't know.

If there are no further questions --

CHIEF JUSTICE ROBERTS: Thank you, Ms. Maynard. Mr. Koch, you have 4 minute remaining.

REBUTTAL ARBUMENT BY KARL KOCH

ON BEHALF OF THE PETITIONER

MR. KOCH: Thank you, Your Honor.

As -- as I indicated before I don't think that it's necessary to overrule Smith to rule for the Petitioner, but if -- if consistency on both sides of

the transaction is desired and certainly something has to go, I would suggest it ought to be Smith because otherwise you're stuck with Bailey and with what I suggest are settled principles of statutory construction. The -- I think Smith takes -- takes it about as far as it could go, and you're having to make -- you have to make a number of linguistic compromises to get to the Smith result to begin with.

The -- with regard to the -- the charging as possession or furtherance or not, again it's not before us, it's not part of this case I would suggest that Mr. Watson possessed this firearm as a consequence of a drug transaction rather than in furtherance of a drug transaction.

I do think, and it's obvious from other statutes in the neighborhood, that Congress certainly knows how to say "receive" and "accept" and words of that nature, if it was its intent to -- to make the receipt of a weapon or bring that within the ambit of this -- of this particular statute.

I don't think it's enough to say, as my opponent does, use as a medium of exchange if it's a crime for example to use a forged instrument. The guy who accepts it doesn't use it, I don't think by any reasonable interpretation. So I think that that -- that

really stretches this farther than it should go.

Lastly, I would point out, and again this is in our brief around page 9, with respect to this 924(d) argument, one of the predicate offenses that's used in 924(d) is 922(j), which includes language "it shall be unlawful for any person to receive, possess, conceal, store, barter, sell, or dispose of" et cetera. Well, "possess" is there in 922(j), yet we know from Bailey that "possess" in and of itself can't be a use. And that's just one of the reasons why that argument unfortunately falls apart when one is trying to import those definitions of use into this statute.

I have nothing further.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Koch. The case is submitted.

(Whereupon, at 10:59 a.m., the case in the above-entitled matter was submitted.)

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